

SECOND REGULAR SESSION

HOUSE BILL NO. 1646

91ST GENERAL ASSEMBLY

INTRODUCED BY REPRESENTATIVES HENDERSON, LUETKEMEYER (Co-sponsors) AND MOORE.

Read 1st time January 24, 2002, and 1000 copies ordered printed.

TED WEDEL, Chief Clerk

3461L.01I

AN ACT

To amend chapter 375, RSMo, relating to insurers by adding thereto six new sections relating to the same subject.

Be it enacted by the General Assembly of the state of Missouri, as follows:

Section A. Chapter 375, RSMo, is amended by adding thereto six new sections, to be known as sections 375.1063, 375.1064, 375.1065, 375.1066, 375.1067 and 375.1068, to read as follows:

375.1063. 1. As used in sections 375.1063 to 375.1068, the following terms mean:

(1) "Director", the director of the department of insurance;

(2) "Insurance compliance audit", a voluntary, internal evaluation, review, assessment, or audit not otherwise expressly required by law of an insurer that is designed to identify and prevent noncompliance and to improve compliance with statutes, rules, regulations, and orders governing the operation of the insurer;

(3) "Insurance compliance self-evaluative audit document" or "document", a document prepared as a result of or in connection with and not prior to an insurance compliance audit. An insurance compliance self-evaluative audit document may include a written response to the findings in an insurance compliance audit. Such a document may include, but is not limited to, field notes and records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, computer-generated or electronically recorded information, phone records, maps, charts, graphs, and surveys, if this supporting information is collected or developed for the primary purpose and in the course of such an audit. Such document may also include any of the following:

(a) An insurance compliance audit report prepared by an auditor, who may be an employee of the insurer or an independent contractor, which may include the scope of the

18 audit, the information gained in the audit, and conclusions and recommendations, with
19 exhibits and appendices;

20 (b) Memoranda and documents analyzing portions or all of the insurance
21 compliance audit report and discussing potential implementation issues;

22 (c) An implementation plan that addresses correcting past noncompliance,
23 improving current compliance and preventing future noncompliance; or

24 (d) Analytic data generated in the course of conducting the insurance compliance
25 audit;

26 (4) "Insurer", as defined in section 375.012.

27 2. Nothing in sections 375.1063 to 375.1068 shall limit, waive or abrogate the scope
28 or nature of any statutory or common law privilege including, but not limited to, the work
29 product doctrine, the attorney-client privilege, or the subsequent remedial measures
30 exclusion.

375.1064. 1. An insurance compliance self-evaluative audit document is privileged
2 information and is not admissible as evidence in any legal action in any civil, criminal, or
3 administrative proceeding, except as provided in sections 375.1065 and 375.1066.
4 Documents, communications, data, reports, or other information created as a result of a
5 claim involving personal injury or workers' compensation made against an insurance
6 policy are not insurance compliance self-evaluative audit documents and are admissible
7 as evidence in civil proceedings as otherwise provided by applicable rules of evidence or
8 civil procedure, subject to any applicable statutory or common law privilege, including but
9 not limited to the work product doctrine, the attorney-client privilege, or the subsequent
10 remedial measures exclusion.

11 2. If any insurer, person, or entity performs or directs the performance of an
12 insurance compliance audit, an officer or employee involved with the insurance compliance
13 audit or any consultant hired for the purpose of performing the insurance compliance
14 audit shall not be examined in any civil, criminal, or administrative proceeding as to the
15 audit or any insurance compliance self-evaluative audit document. This subsection shall
16 not apply if the privilege prescribed by subsection 1 of this section is determined to be
17 inapplicable pursuant to section 375.1065 or 375.1066.

18 3. An insurer may voluntarily submit, in connection with examinations conducted
19 pursuant to chapter 374, RSMo, an insurance compliance self-evaluative document to the
20 director, or the director's designee, as a confidential document without waiving the
21 privilege prescribed in sections 375.1063 to 375.1068, except that the director may disclose
22 such voluntarily submitted document to the National Association of Insurance
23 Commissioners in the same manner as other documents are disclosed. Nothing in this

24 subsection shall authorize the director to compel an insurer to disclose involuntarily or
25 otherwise provide an insurance compliance self-evaluative audit document.

375.1065. 1. The privilege established in section 365.1064 does not apply to the
2 extent that it is expressly waived by an insurer that prepared or caused to be prepared the
3 insurance compliance self-evaluative audit document.

4 2. In a criminal, civil or administrative proceeding, a court may, after an in camera
5 review, require disclosure of material for which the privilege established in section
6 375.1064 is asserted, if the court determines at least one of the following:

7 (1) The privilege is asserted for a fraudulent purpose;

8 (2) The material is not subject to the privilege; or

9 (3) Even if subject to the privilege, the material shows evidence of noncompliance
10 with state and federal statutes, rules, regulations, or orders and the insurer failed to
11 undertake reasonable corrective action or eliminate the noncompliance within a reasonable
12 time.

13 3. In addition to the exceptions prescribed in subsection 2 of this section, in a
14 criminal proceeding, a court may, after an in camera review, require disclosure of material
15 for which the privilege established in section 375.1064 is asserted, if the court determines
16 that the material contains evidence relevant to the commission of a criminal offense and
17 all of the following factors are present:

18 (1) The director, prosecuting attorney, or attorney general has a compelling need
19 for the information;

20 (2) The information is not otherwise available; and

21 (3) The director, prosecuting attorney or attorney general is unable to obtain the
22 substantial equivalent of the information by any means without incurring unreasonable
23 cost and delay.

375.1066. 1. Within thirty days after the director, prosecuting attorney, or attorney
2 general makes a written request by certified mail for disclosure of an insurance compliance
3 self-evaluative audit document, the insurer may file with the circuit court a petition
4 requesting an in camera hearing on whether such document or portions of the document
5 are privileged pursuant to sections 375.1063 to 375.1068 or subject to disclosure. Failure
6 by the insurer to file a petition waives the privilege prescribed by sections 375.1063 to
7 375.1068.

8 2. An insurer asserting the privilege prescribed by sections 375.1063 to 375.1068
9 in response to a request for disclosure pursuant to this section shall include in its request
10 for an in camera hearing the following information, which shall also at that time be
11 provided to the person requesting disclosure:

- 12 (1) The date of the insurance compliance self-evaluation audit document;
13 (2) The identity of the entity conducting the audit;
14 (3) The general nature of the activities covered by the audit; and
15 (4) An identification of the portions of the document for which the privilege is being
16 asserted.

17 3. Upon the filing of a petition pursuant to this section, the court shall issue an
18 order scheduling, within forty-five days after the filing of the petition, an in camera
19 hearing to determine whether the document or portions of the document are privileged
20 pursuant to sections 375.1063 to 375.1068 or subject to disclosure.

21 4. The court, after an in camera review, may require disclosure of the material for
22 which the privilege in section 375.1064 is asserted if the court determines that any one of
23 the conditions set forth in subsection 2 or 3 of section 375.1065 are applicable. Upon
24 making such a determination, the court may only compel the disclosure of this portion of
25 a document relevant to issues in dispute in the underlying proceeding. Any compelled
26 disclosure shall not cause the document to be considered a public document or deemed to
27 be a waiver of the privilege for any other civil, criminal, or administrative proceeding. A
28 party unsuccessfully opposing disclosure may apply to the court for an appropriate order
29 protecting the document from further disclosure.

 375.1067. An insurer asserting the privilege set forth in section 375.1064 has the
2 burden of demonstrating the applicability of the privilege. Once the insurer has
3 established the applicability of such privilege, a party seeking disclosure pursuant to
4 subdivision (1) or (3) of subsection 2 or subsection 3 of section 375.1065 has the burden of
5 proving the appropriate elements exempting the document or portions thereof from the
6 privilege. The parties may at any time stipulate in proceedings pursuant to sections
7 375.1065 or 375.1066 to entry of an order directing that specific information contained in
8 a document is or is not subject to the privilege provided pursuant to section 375.1064.

 375.1068. The privilege provided in section 375.1064 shall not extend to any of the
2 following:

- 3 (1) Documents, communications, data, reports, or other information required to
4 be collected, developed, maintained, reported or otherwise made available to a regulatory
5 agency pursuant to state or federal statutes, rules, regulations or orders;
6 (2) Information obtained by observation or monitoring by any regulatory agency;
7 or
8 (3) Information obtained from a source independent of the insurance compliance
9 audit.